> promoting competing states' interests would not stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' ***Thus, on the narrow topic before us – warnings that are given to airline passengers – we conclude that the Federal Aviation Act impliedly preempts the application of state common-law negligence standards to failure-to-warn claims like that presented here.***

(Pet. App. at 11-12 (emphasis added) (citations omitted) (alteration in original.)

Plaintiffs' Petition for Review to the Supreme Court of Wisconsin was denied on August 25, 2005, and this appeal followed. (Pet. App. at 18-19.)

REASONS FOR DENYING THE PETITION

I. BECAUSE THE FEDERALLY MANDATED UNIFORM IN-FLIGHT WARNINGS SHOULD NOT BE REVIEWED THROUGH DIVERSE STATE TORT LAW PRISMS TO DETERMINE WHETHER ANY WARNINGS ABOUT DVT SHOULD BE GIVEN, THE COURTS BELOW PROPERLY APPLIED THE LAW OF PREEMPTION AND, THUS, DENIAL OF CERTIORARI WOULD BE CONSISTENT WITH THIS COURT'S PRONOUNCEMENTS AND ALL SIMILAR CASES.

The Wisconsin Court of Appeals acted in accord with precedent and the legislative history of the Federal Aviation Act when it dismissed the Complaint with prejudice on the

basis of preemption. Permitting each state to regulate the in-flight warnings an air carrier is required to give passengers would destroy the goal of uniformity Congress sought to achieve in enacting the Federal Aviation Act. Moreover, allowing each state to establish its own requirements for in-flight safety briefings would undoubtedly result in a chaotic and confusing web of conflicting warnings which might be given to different passengers on different flights depending upon those flights' places of departure and destination. As recognized the by Wisconsin Court of Appeals and by every other court that has addressed this warning issue, the uniformity Congress sought can only be effectuated if the in-flight warnings air carriers are required to provide are limited to those mandated by the Federal Aviation Administration pursuant to its authority under the Federal Aviation Act. Any changes in the warnings to cover alleged DVT risks should be dictated by Congress or the Federal Aviation Administration, not any state court jury.

Federal control over in-flight air safety is long-standing and pervasive. As observed by Justice Jackson in a concurring opinion more than sixty (60) years ago:

> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. . . . The moment a ship taxis onto a runway, it is caught up in an elaborate and detailed system of controls. . . . Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944). This long-standing federal presence renders

inapplicable any presumption against preemption. To the contrary, state laws must be preempted to the extent they are inconsistent with the objectives Congress sought in enacting the Federal Aviation Act. *United States v. Locke*, 529 U.S. 89, 108 (2000). In this case, it is patently evident that the in-flight warning requirements which petitioners seek to impose upon Midwest are inconsistent with the goals sought by Congress.

A primary objective of Congress in enacting the Federal Aviation Act was to create a *uniform and exclusive* system of federal regulation of in-flight air safety. As stated by the Court of Appeals for the Second Circuit in *Air Line Pilots Ass'n Int'l v. Quesada*, 726 F.2d 892, 894, 897 (2d Cir. 1960):

> The Federal Aviation Act was passed by Congress for the purpose of centralizing in a single authority – indeed, in one administrator – the power to frame rules for the safe and efficient use of the nation's airspace.
>
> . . . .
>
> The committee reports make plain that the Administrator was to have sole responsibility for safety rule-making under the new law . . . .

Similarly, in *United States v. Christenson*, 419 F.2d 1401, 1404 (9th Cir. 1969), the Court of Appeals for the Ninth Circuit, examining the language and legislative history of the FAA, concluded that "the whole tenor of the Act and its principal purpose is to create and enforce one unified system of flight rules."

This Court has also recognized the need for a "uniform and exclusive" system of federal regulation if the objectives of the Federal Aviation Act are to be effectuated, stating in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973):

> The Federal Aviation Act requires a delicate balance between safety and efficiency. . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

Consistent with the Congressional intent, neither this nor any other Court has hesitated to preempt state laws that conflict with or intrude into areas occupied by the Federal Aviation Administration and its extensive body of regulations.[2] And, while the courts have differed as to the extent to which the Federal Aviation Act preempts state laws, all agree that there exists no room for state laws that seek to regulate in the area of in-flight warnings. Illustrative of this fact is the dissent of this Court in *City of Burbank v. Lockheed Air Terminal*. There, while disagreeing with the majority's holding that federal law preempted a local ordinance placing a curfew on jet flights, the dissenting Justices readily acknowledged and agreed with the majority that it was the

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2. The Administrator has promulgated regulations that fill five volumes of the Code of Federal Regulations. *See* 14 C.F.R. § 1.1, *et seq.* (2005). Included among these regulations are several setting forth the in-flight warnings and instructions which must be given to passengers. 14 C.F.R. § 121.573, 121.573, 121.585. At no time has the Federal Aviation Administration mandated or suggested that any form of a DVT warning be provided.

intent of Congress "to regulate federally all aspects of air safety and, once aircraft were in 'flight' airspace management. . . . *Congress clearly intended to pre-empt the States from regulating aircraft in flight.*" 411 U.S. at 644 (emphasis added) (citations omitted).

A state law or rule of decision that subjects air carriers to potential liability for failing to warn of DVT is effectively a law that would *require* airlines to provide passengers with such a warning and is tantamount to the regulation of aircraft in-flight. As Justice Stevens observed in *Cipollone v. Liggett Group*, 505 U.S. 504, 521-22 (1992):

> [S]tate regulation[] can be as effectively exerted through an award of damages as through some form of preventive relief. . . . Common-law damages actions of the sort raised by petitioner are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose "requirements or prohibitions."

(citations omitted).

Review of this matter is unnecessary because the decision of the state courts is consistent with this Court's precedents and with the objectives Congress sought in enacting the Federal Aviation Act. Further review is also unnecessary because there exists no conflict among the courts as to the single issue raised by this Petition – whether a carrier can be held liable pursuant to state negligence laws for failing to provide passengers with warnings of in-flight risks that go beyond those mandated by the Federal Aviation Administration. Every court that has addressed that issue has held that state laws requiring such warnings are preempted.

See Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 371, 375-76 (3d Cir. 1999) (state negligence claims based upon a failure to warn of expected turbulence are preempted; state law can do no more than provide a remedy for violation of a federally mandated warning); *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 2004); *In re Deep Vein Thrombosis Litig.*, No. 04-1606 VRW, 2005 U.S. Dist. LEXIS 4043 (N.D. Cal. Mar. 11, 2005).

Simply stated, no compelling reason exists to further review this matter. The decision of the Wisconsin state courts is in accord with the decisions of this Court and lower federal courts which have consistently recognized that the Federal Aviation Act impliedly preempts discrete areas of flight safety, including state rulings that attempt to circumvent the judgment of the Federal Aviation Administration concerning what safety briefings, warnings and information should be conveyed to passengers in-flight. The Fifth Circuit Court of Appeals said it best:

> We hold that federal regulatory requirements for passenger safety warnings and instructions are exclusive and preempt all state standards and requirements. Congress enacted a pervasive regulatory scheme covering air safety concerns that includes regulation of the warnings and instructions that must be given airline passengers. The Supreme Court has observed that the [Federal Aviation Act] "requires a delicate balance between safety and efficiency, and the protection of persons on the ground. . . . The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled."

. . . .

> We further hold that federal law exclusively provides the safety warnings that airlines must give passengers, and that state law requiring air safety warnings is preempted. Since there is no federal requirement that airlines give DVT warnings, *Witty's* state claims for failure to warn fails.

Witty v. Delta Airlines, Inc., 366 F.3d 380, 385-86 (5th Cir. 2004) (alteration in original) (quoting *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-39 (1973)). Noting that the goal of uniformity sought to be achieved by the Federal Aviation Act would undoubtedly be undermined if each state were free to establish different in-flight warning requirements, the District Court in the *In re Deep Vein Thrombosis Litigation* followed *Witty* in noting that the goals of the Federal Aviation Act would be undermined by allowing these types of claims:

> [S]tate-law suits based upon failure to warn of DVT would most certainly lead to non-uniformity (anathema to the [Federal Aviation Act]), for each time a state jury sustains a failure to warn challenge, airline defendants would be forced to amend their pre-flight warnings to avoid future liability. Moreover, such state law verdicts could be inconsistent amongst themselves. For example, a jury in Arkansas might find that an airline's oral warnings of DVT risks insufficient because a reasonably prudent airline would have displayed a video warning demonstrating potential preventative measures is required. A jury in

> California, however, could find that an oral warning before takeoff is sufficient while a jury in Texas could find that an oral warning of DVT prior to takeoff is insufficient unless repeated at least three hours into the flight. Juries in the other forty-seven states could reach similar or drastically different results when presented with the same question.

In re Deep Vein Thrombosis Litig., No. 04-1606 VRW, 2005 U.S. Dist. LEXIS 4043, at *44 (N.D. Cal. Mar. 11, 2005).

As all of the courts that have addressed the issue have recognized, allowing the petitioners' cause of action to proceed would cause state law to impermissibly intrude upon a field fully occupied by federal law, and conflict with the objectives of Congress in enacting the Federal Aviation Act. Precedent, legislative history and common sense establish that the rules governing in-flight passenger safety warnings must eminate from a single source and cannot be supplemented by each of the states. For all of those reasons, there exists no need to review the decision of the Wisconsin Court of Appeals preempting its own negligence laws and sagely leaving the issue of in-flight passenger safety warnings to the Federal Aviation Administration.[3]

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3. Petitioners' reliance upon *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005) is misplaced. *Bates* dealt with the construction of a narrowly worded preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which "authorizes a relatively decentralized scheme that preserves a broad role for state regulation." 125 S. Ct. at 1802. Moreover, FIFRA was enacted in the wake of a long history of tort litigation against manufacturers of poisonous substances. As a result, this Court reasoned that

(Cont'd)

II. BECAUSE THERE IS AN ADEQUATE AND INDEPENDENT REASON TO DISMISS THE COMPLAINTS, IN THAT STATE LAW IMPOSED NO DUTY TO WARN, CERTIORARI SHOULD BE DENIED.

Further review of this matter is also unwarranted because, even in the absence of preemption, state laws would provide no recourse for the injuries alleged. The trial court held that "no common law duty to warn exists which would require a commercial carrier to warn passengers of the health risks that could develop as a result of one's idiosyncratic reaction to ordinary air travel." (Pet. App. at 16.) In reaching this result, the decision of the Wisconsin trial court that no common-law claim exists under these circumstances was consistent with long-established precedent.

(Cont'd)

"[i]f Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly." *Id.* at 1801.

The Federal Aviation Act is not encumbered by either a narrowly worded preemption provision nor by a history at odds with a finding of preemption. To the contrary, both prior and subsequent to the enactment of the Federal Aviation Act, both this Court and the Congress deemed it to be essential that control over in-flight air safety remain the exclusive province of the federal government. Nothing in *Bates* alters that fact nor detracts from this Court's continued recognition that common-law duties can impose "requirements" on a defendant. *Bates*, 125 S. Ct. at 1798. Consequently, any such requirement in this case could conflict with the clear Congressional objective of creating a uniform and exclusive system of rules governing in-flight passenger safety warnings.

In *Sprayregen v. American Airlines, Inc.*, 570 F. Supp. 16 (S.D.N.Y. 1983), it was held that American Airlines did not have a duty to issue a general warning about the "risks" associated with flying with a head cold. The District Court's statement in that that particular case is apposite of the view taken by the Wisconsin trial courts in the case at bar:

> [A]s a result of life's idiosyncrasies, certain situations may imperil some passengers but not others. For example, because of Sprayregen's physical condition, altitude changes exposed him to a greater risk of harm than they did to passengers who were not suffering from a similar ailment. The illustration provided in this case, however, is only one of innumerable perils that passengers may face depending upon their peculiar physical or emotion conditions. Should the airline be required to warn its passengers of all such dangers? The court finds that it would be unreasonable to recognize such a duty.

Sprayregen, 570 F. Supp. at 17. The rational articulated in *Sprayregen* was also adopted by the Court of Appeals of the State of Washington in *Marshall v. Western Air Lines, Inc.*, 813 P.2d 1269 (Wash. 1991). In *Marshall*, the Washington Court of Appeals recognized that developing a practical means of providing a warning of an injury that is not likely to be suffered by the average passenger would be practically impossible. It cited to *Sprayregen* and noted the following about why the result in that case should be followed:

> The court concluded that an airline has no general duty to warn of hazards associated with a passenger's particular condition. *Sprayregen*, at

> 18. In the instant case, the only type of warning that might have helped Marshall is a notice before the flight that a very small percentage of individuals, for a variety of reasons, may suffer permanent ear damage due to normal air pressure changes. Based on *Sprayregen*, Western Air Lines had no duty to warn Marshall.

813 P.2d at 1275.

The holding of the Wisconsin court in this case that no common law duty to warn arose under the circumstance is consistent with these decisions. Air carriers cannot be – and are not – charged with the duty to warn about all of the purported problems that individual passengers might encounter as a result of routine air travel. Since the law is clear that no common law duty existed under the circumstances, further review of this decision is unwarranted since the judgment is in accord with relevant state law, and there is no reason or justification for this Court to address any federal question.

CONCLUSION

The Wisconsin courts' dismissal of the Complaint on the basis of preemption is consistent with the objectives of Congress in enacting the Federal Aviation Act, with the precedent of this Court, and with the holding of every other court that has confronted the issue of whether state negligence laws can impose a duty on air carriers to provide passengers with in-flight safety warnings that go beyond those mandated by the Federal Aviation Administration. Further, regardless of the preemption, there is an adequate and independent basis for dismissal, in that state law does not recognize a claim for failing to warn idiosyncratic passengers of risks associated with flight. Thus, there exists no compelling reason warranting a grant of this Petition. For all of the reasons stated herein, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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